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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-670

ACCURACY IN MEDIA, INC.,
Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Respondent,

and

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

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BRIEF OF NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

This brief is submitted on behalf of National Broadcasting Company, Inc. ("NBC") in opposition to the petition for a writ of certiorari filed by Accuracy in Media, Inc. ("AIM"). It is NBC's position that the result reached below by the Court of Appeals, which requires the Federal Communications Commission to dismiss AIM's complaint and to vacate its own Order, was mandated by both the fairness doctrine and the First Amendment, as set forth in Judge Leventhal's perceptive and exhaustive discussion in his original majority opinion for the Court of Appeals.

That being true, NBC believes that review by this Court would be inappropriate and that the petition for certiorari therefore should be denied.

Opinions Below

The letter ruling of William B. Ray, Chief of the Complaints and Compliance Division of the Federal Communications Commission ("FCC" or "Commission") is reported at 40 F.C.C.2d 958 (1973). The Memorandum Opinion and Order of the FCC is reported at 44 F.C.C.2d 1027 (1973). All the opinions in this case of the Court of Appeals are reported at 516 F.2d 1101 and are reprinted in the appendix to the petition.

Jurisdiction*

The judgment and opinions of the Court of Appeals were entered on July 11, 1975. A petition for rehearing was denied on August 7, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

Question Presented

Did the Court of Appeals act improperly in refusing to order NBC to carry additional programming with respect to pensions which differed with that presented in the NBC News Program entitled "Pensions: The Broken Promise" and in ordering vacation of an order of the FCC requiring such programming and the dismissal of a complaint against NBC?

* Apart from AIM's failure to include the First Amendment in its list of statutory provisions involved in this case, we do not object to its recitation of those statutory provisions it believes are relevant to the case.

Statement of the Case

The controversy giving rise to this petition for review arises out of the September 12, 1972 broadcast of the NBC News documentary entitled "Pensions: The Broken Promise." The one-hour program was the first in a series of "NBC Reports" broadcast on Tuesday nights during the 1972-73 season. As summarized in the September 27, 1974 majority opinion of the Court of Appeals, the particular focus of the NBC documentary "was the tragic cases of aging workers who were left, at the end of a life of labor, without pensions, without time to develop new pension rights, and on occasion without viable income." (Pet. A. 35a)*

Although the program was received with critical acclaim and was the winner of the prestigious George Foster Peabody Award, a Christopher Award, a National Headliner Award, an American Bar Association Award and was an Emmy nominee, AIM, a self-proclaimed media watchdog, wrote to NBC President Julian Goodman, on November 6, 1972, condemning the program as "inaccurate and one-sided" in that it supposedly paid inadequate attention to the "positive side" of "private pension plans." (J.A. 38)

Three weeks later, on November 27, 1972, AIM filed a letter of complaint with the Federal Communications Commission. AIM's letter asserted that:

> "Our investigation reveals that the NBC report gave the viewers a grotesquely distorted picture of the private pension system of the United States. Nearly the entire program was devoted to criticism of private

* References to "Pet. A." are to the appendix filed in this Court with the Petition for Certiorari. "J.A." refers to the Joint Appendix in the Court of Appeals.

pension plans, giving the impression that failure and fraud are the rule in the management of private pension funds. The emphasis of the program was on the disappointments, the failures and the embezzlements, with only two brief statements toward the end of the program giving anything on the positive side." (J.A. 1)

After receiving a submission in opposition to the complaint from NBC—which pointed out that the program had not dealt with the pension system as a whole but particular problems that had arisen with respect to certain pension plans—and a further submission from AIM, the staff of the Commission, on May 2, 1975 held the "Pensions" program to have violated the fairness doctrine in the absence of further NBC programming dealing with pensions. (J.A. 55) NBC sought Commission review of the staff decision by letter to the Commission dated June 21, 1973. (J.A. 68) In its submission to the Commission, NBC again stated that its news judgment was that the thrust of its "Pensions" telecast related to abuses with respect to pension plans and not the "overall performance" of the pension system, as asserted by the Commission staff, and that its judgment was reasonable and had been made in good faith. In support of its submission as to the reasonableness of its own characterization of the subject matter of the "Pensions" program, NBC submitted affidavits of its producers and a detailed survey of the contemporaneous reviews by television columnists of the program. NBC urged that the staff's action had been improper and unconstitutional.

On November 26, 1973 the Commission adopted, and on December 3, 1973 formally released, its Memorandum Opinion and Order affirming its staff opinion and directing NBC to advise it of plans for compliance with the fairness doctrine obligations which the Commission found NBC to have violated in presenting its "Pensions" telecast. A petition

for review was filed with the Court of Appeals on December 21, 1973.

NBC sought from the Commission and was denied a stay of the order, and a stay motion was then made in the Court of Appeals in papers filed January 28, 1974. The motion was argued and a stay was granted by the Court on February 14, 1974. In light of the Commission's contention in opposition to the stay motion that the pendency of pensions legislation required expeditious treatment of the case, the Court departed from its usual practice, dispensed with formal briefing and ordered extended oral argument on the merits to be had on February 21, 1974.

The Court continued its stay in effect until September 27, 1974 when, in a 2-1 decision, the Court reversed the Commission and ordered the matter remanded to the Commission with instructions to vacate its order. Judge Leventhal wrote for the majority of the Court in an opinion (the "Panel Opinion") joined by Judge Fahy (Pet. A. 35a); Judge Tamm dissented (Pet. A. 95a). The Panel Opinion, which emphasized the long-established requirement of Commission deference to licensee discretion in applying the fairness doctrine, constituted an explanation of the reasons for granting a stay as well as an opinion on the merits.

On October 29, 1974 AIM filed a petition for rehearing and suggestion for rehearing *en banc;* the Commission did not seek such rehearing. In an order dated December 13, 1974 the Court vacated the Panel Opinion and Judgment and granted rehearing *en banc.*

After briefing on the merits by all parties and *amici* the Commission submitted a suggestion of mootness on March 6, 1975 based on the passage of pension reform legislation subsequent to the February 21, 1974 argument on the mer-

its, but prior to the issuance of the Panel Opinion. Oppositions to the Suggestion of Mootness were filed on behalf of both NBC and AIM. On March 18, 1975 the Court, *en banc,* issued an order vacating its order granting rehearing, reinstated the Panel Opinion and Judgment and remanded the matter to the original panel for consideration of the suggestion of mootness. Chief Judge Bazelon dissented from the March 18 decision in an opinion issued June 2, 1975 (Pet. A. 100a).

The Panel issued a *per curiam* order on July 11, 1975 which vacated the judgment of the Court entered September 27, 1974 and remanded the matter to the Commission in order for it to vacate its December 3, 1973 order and dismiss the underlying Complaint. Although each of the three judges on the Panel joined in the conclusion that the decision of the FCC should be vacated, they differed as to their reasons. Judge Leventhal favored vacation of the FCC opinion because of its substantive incorrectness (Pet. A. 194a); Judge Fahy, although agreeing with Judge Leventhal as to the incorrectness of the Commission ruling, favored vacation in the exercise of the Court's equitable powers in light of circumstances not sufficient to render the case moot, but which, in Judge Fahy's opinion, had "drained" the controversy of its initial vitality (Pet. A. 150a); and Judge Tamm, who originally dissented from the Panel's decision on the merits, favored vacation of the FCC judgment on the ground that the case was moot (Pet. A. 158a).

On August 7, 1975 a petition for rehearing, filed by AIM, was denied by the Court of Appeals. A petition for certiorari was filed by AIM on November 5, 1975.

ARGUMENT

The essential holding of the Panel majority in this case was that the Commission had overstepped its statutory and constitutional bounds and improperly expanded the fairness doctrine in failing to grant NBC the wide latitude which, in Judge Fahy's words, is "accorded the [broadcast] press as essential to the mandate of the First Amendment, notwithstanding the limitation upon complete freedom imposed by the Fairness Doctrine. . . ." (Pet.A. 93a) The Commission erred, in the opinion of the Panel majority, in failing to accept a reasonable judgment by NBC as to the subject matter of its program and by substituting the Commission's own contrary view as to what the program was about—and then ordering counter-programming on the Commission-defined subject of the broadcast. As summarized by Judge Leventhal:

> "The Court has sustained the fairness doctrine in broadcasting as an instance of a necessary control in the public interest. The broadcaster cannot assert a right of freedom of press that transcends the public's right to know. But application of the doctrine must still recognize the enduring values of wide latitude of journalistic discretion in the licensee. And when a court is called on to take a 'hard look' whether the Commission has gone too far and encroached on journalistic discretion, it must take a hard look to avoid enforcing judicial predilections.
>
> "And so it is that a natural judicial tendency to respond to such conditions as conciliation, and recognition of the other's viewpoint in the broad interest of fairness, must yield to a vigilant concern that a government agency is not to intervene or burden or second-guess the journalist given primary discretion and

responsibility, unless there is documentation of unreasonableness on the part of the licensee.

"The foregoing observations are supported by, and indeed are a distillate of, pertinent decisions—including notably the opinions of the Supreme Court in *CBS* v. *DNC*, *Tornillo*, and *Red Lion*—all of which have been carefully studied and discussed.

"Their application to this case convinces us that the Commission did not guide itself by the appropriate restrictive standards." (Pet.A. 90a)

We believe the decision initially reached by Judges Leventhal and Fahy was plainly correct and that any contrary decision would have violated both the fairness doctrine and the First Amendment. That is reason enough for the Court to decline to grant a writ of certiorari in this case.

Moreover, the substantive issues which AIM asserts are presented for review in this matter are, in fact, not raised by this case. The first issue allegedly raised by this case is whether the dismissal of AIM's complaint is "in direct conflict" with the ruling of the Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). It is not. The invocation of *Red Lion* is simply not an answer to every fairness doctrine question, nor to every First Amendment problem raised by implementation of the fairness doctrine. *Red Lion* itself was deliberately couched in narrow language which, while holding constitutional the personal attack and political editorializing regulations adopted by the Commission, observed:

"We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable . . . but will deal with those problems if and when they arise.

> "We need not and do not now ratify every past and future decision by the FCC with regard to programming." (395 U.S. at 396)

The Panel Opinion, written by Judge Leventhal, was explicit in applying both the *Red Lion* decision and the later decision of this Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). The latter decision affirmed the broad discretion afforded broadcast licensees under the fairness doctrine in language such as that of Chief Justice Burger (for himself and four other members of the Court):

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression." (412 U.S. at 124-25)

Similarly, Mr. Justice Stewart observed in *CBS* that:

> "If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom." (412 U.S. at 146)

Thus neither the opinion of the majority of the panel of the Court of Appeals nor the ultimate disposition of the case in NBC's favor by that Court violated the fair-

ness doctrine, as correctly interpreted by Judge Leventhal. Neither did they—in AIM's language—"carve out an exception to the application of the doctrine for news documentaries and similar programs." (AIM Bf. p. 13) NBC did not seek any sweeping exemption from the fairness doctrine of all documentaries or investigative reporting. It did urge that since the target of investigative or exposé reporting was so often government itself, that the government—including the FCC—should act with particular delicacy and care before requiring counter-programming with respect to such programs.* Nor did the Panel Opinion written by Judge Leventhal hold that investigative journalism was exempt from the fairness doctrine. That opinion did conclude—correctly, in NBC's view—that given the distinctive role of such efforts in "uncovering and exposing abuses", the Commission could not:

> "be free to review the editorial judgments involved in selection of theme and materials, to overrule the licensee's editorial 'judgment as to what was presented', though not unreasonable, to conclude that in the agency's view the exposé had a broader message in fact than that discerned by the licensee and therefore, under the balancing obligation, required an additional and offsetting program." (Pet. A. 71a)

In short the contention that the majority decision below "exempted" documentaries and investigative journalism

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* Indeed, NBC took pains to point out in its brief to the Court of Appeals *en banc* that it sought no "exemption" from the fairness doctrine for investigative reports. As it stated there:

> "This is not to say that investigative reports are not subject to the fairness doctrine; the majority opinion of the panel did not so hold and NBC did not urge that view upon the Court. It is to say that the greatest restraint must be used in applying the doctrine to such reporting, lest a type of news coverage already fraught with risk be made unacceptably dangerous." (NBC Bf. p. 23)

from the fairness doctrine is inaccurate. The July 11, 1975 order of the Panel, not being a disposition on the merits, of course, did not reach that subject.

Finally, the current procedural posture of the case militates against certiorari being granted in this case. The Panel Opinion was first vacated by the Court of Appeals *en banc*, then reinstated again by the Court *en banc* after the Commission suggested that the passage of time had rendered its decision moot and then finally vacated again by the original panel as part of the Court's ultimate determination in the case that AIM's complaint should be dismissed and the FCC's Order in the case be vacated. The three members of that panel each agreed that the Commission's Order should be vacated; Judge Tamm because he believed it moot; Judge Leventhal because he believed it incorrect on the merits; and Judge Fahy, while sharing Judge Leventhal's view on the merits, because he believed such result represented an appropriate exercise of the Court's inherent discretion.

In light of the clearly appropriate result reached by the Court of Appeals in remanding to the Commission for vacation of its order and dismissal of the complaint and the complicated, indeed baroque, procedural posture in which the matter, now some thirty-nine months old, rests, it is NBC's belief that the Court should deny a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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